M/027/007

WESTERN STATES MINERALS CORPORATION

February 18, 1997

Mr. D. Wayne Hedburg, Permit Supervisor
State of Utah, Division of Oil, Gas and Mining
355 West North Temple
3 Triad Center, Suite 350
Salt Lake City, Utah 84180-1203

Re: Update on WSMC/Jumbo Litigation
Colorado Court of Appeals Ruling

Dear Mr. Hedburg:

In an effort to keep you and the Division of Oil, Gas and Mining updated on the status of the litigation between Western States Minerals Corporation and Jumbo Mining Company, I am enclosing a copy of the decision by the Colorado Court of Appeals dated February 6, 1997. In (my) layman's terms the judgment of the trial court was affirmed except for certain damages claimed by Western States and denied by the trial court. This is the part that was reversed in part and remanded to the trial court for further consideration.

Therefore, the Order of May 16, 1994 still stands and is enforceable: "... that Defendants, ASOMA and Jumbo are to forthwith perform all contract obligations to assume all reclamation at the Drum Mine; this obligation includes undertaking forthwith whatever bonding requirements are required by the appropriate authorities in the State of Utah to effectuate the clear purpose of this contract, which is that Defendants assume all reclamation responsibilities" (emphasis added). You already have been provided with a full copy of the Judgment and Order.

Please feel free to call me if you have any questions.

Sincerely,

Allan R. Cerny

Allan R. Cerny
Secretary

cc: L. Foreman
S. Alfers
M. Keller

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COLORADO COURT OF APPEALS
No. 94CA1445
No. 94CA1468
No. 94CA1976

February 6, 1997

NOT SELECTED FOR PUBLICATION

Western States Minerals Corporation, a Utah corporation,

Plaintiff-Appellant and Cross-Appellee,

v.

Asoma (Utah), Inc., a Delaware corporation and Jumbo Mining Company, an unincorporated association,

Defendants-Appellees and Cross-Appellants.

Appeal from the District Court of Jefferson County
Honorable Tom Woodford, Judge
No. 90CV3966

Division III
Opinion by JUDGE RULAND
Plank and Jones, JJ., concur

JUDGMENT AFFIRMED IN PART, REVERSED IN PART, AND CAUSE REMANDED WITH DIRECTIONS

Haddon, Morgan & Foreman, P.C., Lee D. Foreman, Rachel A. Bellis, Denver, Colorado, for Plaintiff-Appellant and Cross-Appellee

Holland & Hart, William E. Mooz, Jr., Donald A. Degnan, Boulder, Colorado; Z. Lance Samay, Morristown, New Jersey, for Defendants-Appellees and Cross-Appellants

This is an action to reform a quitclaim deed and to recover damages for breach of contract in connection with the sale of a mine by plaintiff, Western States Minerals Corporation, to defendant, Asoma (Utah), Inc. Defendant, Jumbo Mining Co., is the successor in interest to Asoma.

Defendants Asoma and Jumbo appeal that part of the trial court's judgment reforming the deed and requiring specific performance of the reformed instrument. Plaintiff appeals that part of the judgment rejecting its damages claims for breach of the contract and breach of the covenant of good faith and fair dealing. Plaintiff also appeals the trial court's denial of its request for attorney fees against defendants Asoma and Jumbo. We affirm in part, reverse in part, and remand with directions.

I

Defendants' first contention is that the trial court's findings in support of its reformation decree are clearly erroneous. We perceive no error.

Reformation of a written instrument is appropriate when there is clear and convincing evidence that the instrument does not represent the actual agreement of the parties. Further, reformation is an available remedy when a scrivener's error creates a mistake such that the written agreement does not correctly state the actual terms agreed upon. Maryland Casualty Co. v. Buckeye Gas Products Co., 797 P.2d 11 (Colo. 1990).

As pertinent here, there must be an antecedent agreement between the parties on the subject of reformation. See Segelke

v. Kilmer, 145 Colo. 538, 360 P.2d 423 (1961). In addition, it must appear that a mistake was made by the injured party and that fraud or inequitable conduct was committed by the other. Boyles Brothers Drilling Co. v. Orion Industries, Ltd., 761 P.2d 278 (Colo. App. 1988).

Here, the deed was drafted to provide that: "Assignor [plaintiff] shall be responsible for all reclamation on the lode mining claims and the properties." The trial court found by clear and convincing evidence, however, that, contrary to this provision, the parties intended that Asoma should assume all reclamation responsibilities.

A

Asoma and Jumbo first contend that there was insufficient evidence to support the court's finding under the clear and convincing standard that an antecedent oral agreement was reached obligating Asoma to pay all reclamation costs. We disagree.

The trial court found with record support that, in late 1987 and early 1988, the parties discussed the purchase of the mine. In June 1988, they agreed that Asoma would purchase the mine "where is, as is," and that plaintiff would "walk away" from the project with no remaining responsibility. Indeed, written notes made by the chief executive officer (CEO) of Asoma reflect an existing reclamation obligation of approximately $250,000 that Asoma would apparently assume.

Plaintiff's attorney who drafted the quitclaim deed was instructed to make defendant Asoma responsible for all

reclamation obligations, but mistakenly used the word "assignor," thus inadvertently designating plaintiff as the responsible party. The quitclaim deed was an exhibit attached to the option agreement signed by the parties on June 30, 1988.

The trial court further found with record support that prior to closing on October 12, Asoma's CEO acknowledged in a conversation with plaintiff's land manager that Asoma had accepted the reclamation obligation, but that it was not covered in the agreement. The land manager mistakenly responded that Asoma's obligation was in fact incorporated into the agreement.

Moreover, and contrary to Asoma and Jumbo's implicit contention, the trial court properly considered conduct, comments, and correspondence by Asoma and its CEO after the closing as support for its finding of an antecedent oral agreement.

Finally, to the extent that Asoma and Jumbo presented evidence that there was an agreement that plaintiff would be responsible for reclamation, we note only that the trial court was not persuaded by this evidence. Further, the trial court has the sole responsibility for resolving issues of credibility as well as the probative effect of the evidence and the inferences to be drawn from that evidence. Linley v. Hanson, 173 Colo. 239, 477 P.2d 453 (1970).

For the reasons stated, we conclude that the record fully supports the court's findings. Hence, we perceive no error in

the court's determination to reform the deed based upon the antecedent oral agreement.

B

Asoma and Jumbo next contend that the trial court erred in reforming the deed because the record fails to support its finding that they were responsible for any inequitable conduct. Again, we disagree.

As noted, plaintiff's evidence established the parties' oral agreement. The trial court also found with record support that, prior to closing, Asoma's CEO was aware of the mistake in the deed and that plaintiff was not. Further, the court concluded that Asoma's motive in failing to disclose the mistake was to avoid obligations that had initially been agreed to.

Under these circumstances, we conclude that there was sufficient evidence of inequitable conduct to warrant reformation based on plaintiff's unilateral mistake. See World of Sleep, Inc. v. Seidenfeld, 674 P.2d 1005 (Colo. App. 1983). This is particularly so in light of the extensive negotiations the parties conducted relative to modification of the transaction prior to closing and the fact that Asoma had the opportunity not to close if it so elected.

Because there is record support for the court's findings, we many not disturb such on appeal. See Jackson Enterprises, Inc. v. Maguire, 144 Colo. 164, 355 P.2d 540 (1960).

C

Relying on Smith v. Whitlow, 129 Colo. 239, 268 P.2d 1031 (1954), Asoma and Jumbo contend that plaintiff's failure to detect its mistake in the quitclaim deed constituted negligence which precludes reformation. We are not persuaded.

In our view, defendants' reliance on Smith v. Whitlow, supra, is misplaced. In Smith, our supreme court held that if there is a unilateral mistake on the part of one party, unaccompanied by wrongful conduct by the other, the mistaken party's failure to exercise reasonable diligence is a bar to reformation. This holding is not applicable here, however, because of Asoma's knowledge of the mistake and the failure to disclose that mistake based upon an intent to take advantage of the error. See Restatement (Second) of Contracts §166 comment a (1981)(Reformation based on misrepresentation is not precluded by fact that the party who seeks it failed to exercise reasonable care in reading the writing).

D

Asoma and Jumbo argue that plaintiff waived its right to seek reformation when it failed to correct the quitclaim deed after Asoma's CEO advised plaintiff's land manager that the documents did not make Asoma responsible for reclamation. Again, we are not persuaded.

For a waiver to occur, there must be both knowledge of a legal right and intent to relinquish that right. World of Sleep v. Seidenfeld, supra. However, the trial court found credible

the land manager's testimony that he was certain that the documents made Asoma responsible for all reclamation. Therefore, there is no support for the conclusion that plaintiff knowingly waived any right under the oral agreement.

E

Finally, and relying on Nelson v. Elway, 908 P.2d 102 (Colo. 1995), Asoma and Jumbo contend that the trial court erred in admitting parol evidence of the oral agreement because there was an integration clause included in the option agreement. We disagree.

Nelson does not address the admissibility of parol evidence in the context of a claim for reformation based upon a mistake in the preparation of a contract. As a result, we find no basis in Nelson for concluding that prior case law permitting introduction of parol evidence in this situation have been overruled. See Boyles Brothers Drilling Co. v. Orion Industries, Ltd., supra.

II

A

In its appeal, plaintiff first contends that the trial court erred in failing to award any damages for breach of the reformed agreement and breach of the covenant of good faith and fair dealing. Relying upon such cases as Tull v. Gunderson's Inc., 709 P.2d 940 (Colo. 1985), plaintiff contends that the fact of damage was established and that, therefore, an award was mandatory. We agree that a remand is necessary as to part of its claim.

Here, plaintiff asked to recover three types of damages consisting of various alleged expenses incurred in connection with its reclamation bond, time and costs expended by its employees in connection with the bond and reclamation issues, and attorney fees and expenses incurred in proceedings relating to the bond or reclamation issues.

In its findings, the trial court appeared to find both that the expenses and time expended by counsel and plaintiff's employees could not be determined based upon plaintiff's evidence and that such were not proven to be caused by the breach. In its order denying post-trial relief, the court made clear that it was finding that all of the damage claims were not proven to have resulted from the breach.

With reference to the charges for plaintiff's employees' time, we find record support for this ruling. Cross-examination established that various per hour billing increments recorded by the employees on the reclamation issues were inaccurate. Hence, the court properly concluded, in its discretion, that this evidence should be excluded as not credible on the issue of damages. And, the court is not required to speculate on what damages might be appropriate if it deems the evidence thereof not credible. See Tull v. Gunderson, Inc., supra.

With reference to the attorney fees and costs, out-of-pocket expenses incurred by Western for bond premiums, other items, and soil tests required by the state of Utah, however, we are not clear as to the basis for the court's decision. While the court

questioned the reasonableness of certain attorney fees because two or more attorneys were acting together to perform certain work, such duplication would affect the amount to be awarded but not the fact of damage. See Peterson v. Colorado Potato Flake & Mfg. Co., 164 Colo. 304, 435 P.2d 237 (1967). Similarly, we are unable to determine from the court's findings why the other referenced expenses and costs were not attributable to the breach.

Accordingly, to the extent this claim was rejected as not caused by the breach, additional findings are required for us to determine the basis for the court's conclusion. Further, the court did not address in its decision the issue of an award of nominal damages. See Comfort Homes, Inc. v. Peterson, 37 Colo. App. 516, 549 P.2d 1087 (1976). Hence, the cause must be remanded for further proceedings as to these aspects of the damage claim.

III

We have considered and find no merit in plaintiff's contention that the trial court abused its discretion in denying plaintiff's request for attorney fees incurred in litigating the reformation issue. See Romberg v. Slemon, 778 P.2d 315 (Colo. App. 1989).

That part of the judgment reforming the deed and ordering specific performance of the reclamation obligation is affirmed. That part of the judgment disallowing plaintiff's claim for damages based upon the employee costs is also affirmed. That

part of the judgment disallowing plaintiff's damages claim for attorney fees, bond premiums, and soil tests is reversed and the cause is remanded for further proceedings consistent with the views expressed in this opinion.

JUDGE PLANK and JUDGE JONES concur.